

² The Board notes that, following the March 3, 2020 decision, appellant submitted additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 13, 2019 appellant, then a 53-year-old mine safety and health inspector, filed an occupational disease claim (Form CA-2) alleging that he developed binaural hearing loss due to factors of his federal employment, including noise exposure to mining and drilling machinery. He noted that he first became aware of his condition and its relationship to his federal employment on June 18, 2019. Appellant did not stop work.

In an accompanying narrative statement, appellant listed his work assignments at various mining sites. He noted that he was exposed to noise from mining and drilling equipment for 50 to 60 hours per week from May 1984 through October 1997, 60 to 70 hours per week from October 1997 through November 1999, more than 70 hours per week from November 1999 through September 2004, 60 to 70 hours per week from September 2004 through September 2006, and 40 hours per week from September 2006 to the present.

In an August 13, 2019 statement, appellant's supervisor, W.C., noted that the employing establishment conducted noise surveys at surface and underground coal mines and facilities. He confirmed that appellant was exposed to hazardous noise levels since 2006 as he was involved with mine inspection and investigation activities. W.C. noted that appellant was exposed to noises from large mine fans, roof bolting machines, mining machines, bulldozers, front-end loaders, shovels, crushers, graders, and other surface equipment. He further noted that appellant's employment required him to be in close proximity to machinery and to observe it in an operational state.

In a development letter dated September 4, 2019, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor and an explanation of appellant's work activities and noise exposure. It afforded both parties 30 days to submit the necessary evidence.

OWCP subsequently received audiological reports, audiograms, and physical examination reports, dated August 1, 2006 through June 18, 2019, from the employing establishment, related to appellant's hearing loss and exposure to noise.

On September 9, 2019 appellant responded to OWCP's development questionnaire. He noted that he remained exposed to hazardous noise at work. Appellant indicated that he had not previously filed any workers' compensation claims for a hearing or ear condition and did not serve in the military. He noted that he had tinnitus and that he was exposed to loud noise while performing yard care for one to three hours per month.

On November 5, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. William Brown, an audiologist, for audiometric testing, and to Dr. Andrew Mickler, a Board-certified otolaryngologist, for a second opinion evaluation.

In a November 21, 2019 report, Dr. Brown conducted an audiometric test, which revealed losses of 25, 30, 40, and 65 decibels (dBs) on the right and 35, 35, 55, and 75 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively.

In a November 21, 2019 narrative report, Dr. Mickler reviewed appellant's medical record and the SOAF, performed a physical examination, and completed OWCP's evaluation questionnaire. He noted that there was no significant variation from the SOAF. Dr. Mickler diagnosed sensorineural hearing loss and tinnitus. He indicated that appellant's workplace exposure was "sufficient as to intensity and duration to have caused the loss in question." Dr. Mickler further noted that appellant's November 21, 2019 audiogram was similar to his August 1, 2006 baseline audiogram and opined that his conditions were not due to his federal employment. He attached a tinnitus handicap inventory (THI), dated December 2, 2019, which showed that appellant had severe tinnitus.

By decision dated December 6, 2019, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish hearing loss causally related to the accepted factors of his federal employment.

On December 23, 2019 appellant requested reconsideration. He asserted that his previous audiograms were not thoroughly evaluated. Appellant argued that his August 11, 2006 audiogram should have been used as a baseline as opposed to his August 1, 2006 audiogram. He explained that, in August 2006, he was diagnosed with moderate hearing loss and then, in November 2009, he was diagnosed with mild-to-severe hearing loss. Appellant noted that the "audiogram on August 1, 2006 was not accepted because it did not meet [employing establishment] standards, but is being used for a baseline." He queried, "[i]f a[n] audiogram is not acceptable, how can it be considered as a baseline?" Appellant submitted noise reports, dated July 30, 2007 through September 4, 2019, which showed levels of noise exposure at his various job sites.

By decision dated March 3, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128 (a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation, at any time, on his or her own motion or on application.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

³ 5 U.S.C. § 8128(a); *see J.T.*, Docket No. 19-1829 (issued August 21, 2020); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In his timely request for reconsideration, appellant asserted that his prior audiograms were not properly evaluated. He argued that his August 11, 2006 audiogram should have been used as a baseline as opposed to his August 1, 2006 audiogram. Appellant contended that his August 1, 2006 audiogram was used as a baseline despite being declared unacceptable for not meeting the employing establishment's standards. He further asserted that his hearing loss increased when comparing the August 2006 audiograms to a November 2009 audiogram. The Board finds that appellant's legal arguments are new and relevant to the underlying issue in this case of whether his diagnosed hearing loss is causally related to the accepted factors of his federal employment.⁸

As appellant has advanced a new and relevant legal argument, he is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.⁹ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3); *see J.V.*, Docket No. 19-0990 (issued August 26, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.607(a); *see M.M.*, Docket No. 20-0523 (issued August 25, 2020).

⁶ *Id.* at § 10.608(a); *see M.M.*, Docket No. 20-0574 (issued August 19, 2020); *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *see J.V.*, *supra* note 4; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *See M.L.*, Docket No. 20-0605 (issued January 27, 2021).

⁹ *See D.T.*, (*L.S.*), Docket No. 19-1060 (issued October 20, 2020); *J.T.*, *supra* note 3; *T.P.*, Docket No. 18-0608 (issued August 2, 2018); *see L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 26, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board